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Supreme Court of the United States

October Term, 1957

No. 424

PIERRE BOURGEOIS,

Petitioner,

v.

MERCANTILE NATIONAL BANK OF MIAMI BEACH, FLORIDA, a United States corporation,

Respondent.

PETITION FOR WRIT OF CERTIORAI TO THE SUPREME COURT OF FLORIDA

JACOB RASSNER,
Attorney for Petitioner.

INDEX

	PAGE
Official Report of the Court Below	1
Jurisdiction	1
Questions Presented	2
Reason for Granting the Writ	2
Opinions of the Courts Below	3
Statement of Facts	4
Argument	7
The Law Applicable	9
Conclusion	12

Cases Cited

Bischoff v. Yorkville Bank, 218 N. Y. 106, 114, 112 N. E. 759	10
Brill v. Tuttle, 81 N. Y. 455	10
Colby v. Riggs Bank, 92 F. 2nd 183 (D. C. Cir.)	11
Emmerich v. City Farmers Bank & Trust Co., 300 N. Y. 417, 91 N. E. 2nd 868	10
Fidelity & Casualty Co. v. Farmers National Bank, 275 N. Y. 195, 205, 9 N. E. 2nd 833	10
Gaines v. Miller, 111 U. S. 395	11
Grace v. Corn Exchange Bank, 287 N. Y. 94, 38 N. E. 449	10
In re The Van Sweringen Co., 119 F. 2nd 231, cert. denied, 314 U. S. 671	11
Jacobellis v. Prudential Ins. Co., 244 App. Div. 255, aff'd 269 N. Y. 632, 200 N. E. 32	11
Lewine v. National City Bank, 248 N. Y. 365, 373, 162 N. E. 284	10
Lonsdale v. Speyer, 249 App. Div. 133	11

PAGE

Madison Trust Co. v. Carnegie Trust Co., 215 N. Y. 475, 109 N. E. 580 10
Marcus v. Otis, 168 F. 2nd 649 (2nd Cir.) 11
Martin v. First National Bank, 51 F. 2nd 840 (D. Minn.) 10
Millett v. Omaha National Bank, 30 F. 2nd 665 (8th Cir.) 11
Munn v. Boasberg, 292 N. Y. 519, 54 N. E. 2nd 205 .. 10
National Bank v. Insurance Co., 104 U. S. 54, 71 12
Okeechobee County v. Florida National Bank of Jacksonville, 145 Fla. 486, 1 So. 2d 263 (1941) 9
Raymond Concrete Pile Co. v. Federation Bank, 288 N. Y. 452, 458, 43 N. E. 2nd 486, 489 12
Strauss v. U. S. Fidelity Co., 63 F. 2nd 174 (4th Cir.) 10
Union Stock Yards Bank v. Gillespie, 137 U. S. 411, 423 12
Wechsler v. Bowman, 285 N. Y. 284, 291, 34 N. E. 2nd 322, 326 12
Yarborough v. Ball U-Drive System, Inc., 48 So. 2d 82 (Fla.) 8

Other Authorities Cited

U. S. C. Title 12, Chap. 2, Sec. 21 et seq. 2fn
Title 28, U. S. C. Sec. 1254 and Sec. 1257 (2 & 3) ... 2
National Banking Act June 3, 1864, as amended by June 20, 1874, Chap. 843, Secs. 1-18, Stat. 123, and amendments thereto 2fn
National Banking Act (U. S. Comp. St. Sec. 9657, et seq.) 2fn
26 Ruling Case Law 1322 11
Restatement of the Law of Trusts, Section 326 11
90 Corpus Juris Secundum 834 10
Scott Trusts, Section 226 11

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PIERRE BOURGEOIS,

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MERCANTILE NATIONAL BANK OF MIAMI BEACH, FLORIDA, a United States corporation,

Respondent.

PETITION FOR WRIT OF CERTIORAI TO THE SUPREME COURT OF FLORIDA

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Pierre Bourgeois, prays that a writ of certiorari issue to review the decision of the Supreme Court of Florida rendered on June 5, 1957.

Official Report of the Court Below

The opinion of the Supreme Court of Florida is officially reported in 95 So. 2nd 918.

Jurisdiction

The opinion of the court below was filed on June 5, 1957. Judgment thereon was entered in the office of the clerk of the court on August 20. 1957.

Jurisdiction to review this decision is predicated upon Title 28 U. S. C. § 1254 and § 1257 (2 and 3).[1]

Questions Presented

1. May a National Banking Act be invoked as a shield to protect a national bank from the consequences of its breach of the terms of a written contract? A national bank having agreed to represent its customer and collect funds for his account, in accordance with written specified procedure, including the making of an "aval", may it thereafter refuse to make such "aval", by asserting that doing so would be an *ultra vires* act, using its own interpretation that the word "avail" means guaranty?

2. When a national bank in Florida contracts to act as receiving agent for a special fund for its customer, can the said receiving bank refuse to perform its contract with its customer, after it has received the funds as agreed, by thereafter questioning the title to the funds?

Reason for Granting the Writ

A national bank has arbitrarily and of its own volition assumed to grant itself immunity from the consequences of a breach of a written contract under circumstances where if a private bank or person had committed such a breach, the word "aval" means guaranty?

This would tend to destroy uniformity by absolving a national bank from the consequences or liability of its breach of contract under circumstances where all others would be held liable.

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[1] *National Banking Act* (U. S. Comp. St. Sec. 9657, *et seq.*).

The statute involved is the *National Banking Act* of June 3, 1864 as amended by June 20, 1874, Chap. 343 § 1-18, Stat. 123 and amendments thereto.

Also U. S. C. Title 12, Chap. 2 §21, *et seq.*

Opinions of the Courts Below

Petitioner prays for a writ of certiorari to review the decision of the Supreme Court of Florida filed on the 5th day of June, 1957, which is as follows:

"*Per Curiam*:

Affirmed.

TERRELL, *C. J.*, THORNAL & O'CONNELL, *JJ.*, & SANDLER, Associate Justice, Concur."

An appeal had been taken to said court, the highest court in Florida, from the decision of Circuit Judge Vincent C. Giblin, dismissing petitioner's cause of action on a directed verdict, judgment being entered on the 15th day of November, 1955, on the opinion dated November 15, 1955, which reads as follows:

"The Court: I will grant the pending motion. I think there is no cause of action or any claim for relief established by the evidence for the reason, if for no other reason, the bank could not, in my opinion, have safely surrendered the funds to the plaintiff without subjecting itself to liability as a guarantor.

I do not agree that the unconditional title and right to the possession of the funds rested in the plaintiff at any time until the bank assumed the obligation which was a condition precedent to its delivery of the funds to the plaintiff, that is, the guarantee of the payment of the note which was a part of the negotiations between the bank and the plaintiff and the other parties involved.

It is not necessary for me to rule on the many objections and motions made during the trial. If I should sustain all of the plaintiff's objections and grant all the plaintiff's motions and overrule all the defendant's objections and deny all of the defendant's motions, the result would be the same, in the light of the undisputed, uncontroverted evidence.

[119] I do not think there is any case here at all. Nothing said changes my mind about it. I will enter judgment for the defendant.

(Thereupon the case was concluded.)"

See Appendix, pages 13-16.

Statement of Facts

Petitioner had negotiations with "Mercantile"[2] which resulted in the sending of the following letters to "Banque Francaise du Commerce Exterieur",[3] Paris, France, and Chantiers Navals de La Ciotat, also of Paris, on May 16, 1955.

The letter to the French bank is found on pages 35 and 98 of the Appendix and states:

> "Our bank has accepted a note guaranteeing without reserve payment in the amount of $228,570, such executed by Client Pierre Bourgeois, to the order of Chantiers Navals de La Ciotat, payable on or before December 13, 1955.
>
> We shall hold it for their account and receive the payment thereon and guarantee that such monies will be forwarded to them payable in U. S. funds, American dollars, on New York bank, New York U. S. A.
>
> Upon receipt of this letter, we shall beg that you kindly cable the funds to the Mercantile National Bank of Miami Beach, Miami Beach, Florida, for the account of Pierre Bourgeois as contracted" (Plaintiff's Ex. 1-A).

The letter to Chantiers Navals de La Ciotat, Appendix pages 34, 99, Plaintiff's Exhibit 1-C, was almost the same with minor changes.

On May 23rd "Mercantile" sent a cable to the Paris office of Chase Manhattan Bank to advise "Banque Francaise" that the letters addressed May 16 to the French Bank and La Ciotat, Paris, "constitutes fullest reimburse-

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[2] Mercantile National Bank of Miami Beach, Florida, hereinafter referred to as "Mercantile".

[3] Banque Francaise du Commerce Exterieur hereinafter referred to as "Banque Francaise".

ment guarantee that an American bank can issue" and consequently that it is looking for their immediate transfer of funds to Miami as requested (Appendix pp. 37, 99, Plaintiff's Ex. 1-D).

On May 27, 1955, "Mercantile" sent the following cablegram to "Banque Francaise" (Appendix p. 33):

> "Mercantile makes irrevocable agreement to reimburse draft $228,570, described in our letters May 16 to you and Ciotat which constitutes our guarantee in full" (Plaintiff's Ex. 1-B, Appendix p. 98).

As a result of these cablegrams by order of its client Chantiers de La Ciotat, "Banque Francaise" sent its order of payment to First National City Bank on May 31st.

Consequently, First National City Bank sent its night telegram of May 31st to "Mercantile".

The night telegram of May 31st states that National City Bank has "received the following cable from "Banque Francaise" for transmission to you".

> "We have received your cable worded thus:"

Then follows the identical words of the cablegram from "Mercantile" to "Banque Francaise":

> "Mercantile makes irrevocable agreement to reimburse draft dollars 228,570 described our letters May 16 to you and Ciotat which constitutes our guarantee in full."

This is the cablegram proven in this case (p. 24) and the very same words taken from the night telegram of May 31st (Defendant's Ex. D-1, Appendix p. 101).

This cablegram of "Mercantile" was accepted and acted upon by Cantiers Navals de La Ciotat and "Banque Francaise" sent its cablegram of May 31st to First National

City Bank. On May 31, 1955, First National City Bank sent a night letter to Mercantile, which is set forth in full as Defendant's Exhibit D-1A, Appendix page 102.

The transfer of the funds to the respondent for the use, benefit and credit of the petitioner is evidenced by the coded telegram received by respondent from Chase Manhattan Bank, referred to at length at pages 25 to 29 inclusive of the Appendix.

On page 103 of the Appendix there is a record of communication that was sent by "Mercantile" to "Banque Francaise":

> "Re 228,570 Bourgeois-Ciotat; Transfer having not been made as demanded and expected we are compelled to withdraw. We await instructions" (Defendant's Ex. D-3, Appendix p. 103).

The petitioner testified as to the facts of a number of contracts and shipbuilding contracts he was the beneficiary of, and which he had paid for, and for which he had invested in the past considerable sums of money (Appendix p. 63).

He also testified that in the matter presently litigated, and furthermore ruled in his favor against his co-contracting parties abroad, the "aval" contracted, and actually given by the defendant bank, was not a so-called "banking guaranty", and simply the forwarding by the collecting bank to the debtors of the money of the notice that it was his intent to fulfill the contracts on his side, as contracted (Appendix p. 66).

"Mercantile" had agreed in writing to become the agent of the petitioner, and had agreed as such to collect for his account certain funds due him in the sum of $228,570, and additional sums also due him thereafter, from his debtors and co-contracting parties in the Republic of France, Chantiers Navals de La Ciotat and "Banque Francaise", used by the former as their transmittal agent. And "Mer-

cantile'' had agreed with the petitioner, and did give on his behalf, the so-called ''aval'' (or notice of his later intent of fulfillment of his side of the contract), to his above mentioned present and later debtors (Plaintiff's Exs. 1-A and 1-C).

''Mercantile'' sent their own interpretation of the possible limitation of United States law to ''Banque Francaise'', thereafter mutually agreed upon between the debtor and ''Mercantile'', as agent for the said collection in favor of the petitioner, its client (Plaintiff's Ex. 1-D).

After all that was done, which lasted for a period of fifteen days, and the petitioner's own funds were released with the permission of the French Exchange Control Authorities, to the benefit of whom the ''aval'' clause had primarily been set in, such funds were put into ''Mercantile's'' account, for being paid immediately to him (Appendix p. 66).

After the several exchanges of correspondence between ''Mercantile'' and ''Banque Francaise'', ''Mercantile'' commenced ''hedging'' and seeking excuses for breaching its contract, putting into fallacious argument their own interpretation of the word ''aval'' and thought it would force the bank into the position of a guarantor, which according to their contention was an *ultra vires* act.

Evidence is that the word ''aval'' did not mean guaranty and the evidence is that there was no guaranty in fact. For the purpose of clarification, petitioner would like to point out that the money in question was in fact petitioner's money (Appendix pp. 89, 91, 94).

Argument

The documents upon which petitioner predicated his cause of action is set forth in the statement of facts substantially in their entirety for the convenience of this Honorable Court.

The questions presented are ones of law. There is no issue of fact as the trial Court directed a verdict, therefore, the evidence must be given the most favorable construction to the petitioner's contention.

This principle of law is so well settled, throughout the country, that we will not burden this Court with many citations but desire to point out that Florida is no exception. *Yarborough* v. *Ball U-Drive System, Inc.*, 48 So. 2d 82 (Fla.).

Reduced to its practical application, we here have a businessman of many years' experience risking his own capital in industrial enterprise (Appendix pp. 60-66), making a written agreement with a national bank and then finding that the bank by its arbitrary interpretation of words and legal provisions, improperly using provisions of banking law as an excuse to recant on its freely undertaken commitments.

It would appear that there are no cases which support the action of the Supreme Court of Florida, or support the decision of Judge Giblin.

There does not seem to be any evidence in the case which would tend to support the finding by Judge Giblin that the effect of the "aval" would be a banking guaranty. We would like to point out that the very notice of "Mercantile" given on May 23, which was of itself a qualification of the limitation of its undertaking.

Assuming *argumentae* that the "aval" could be construed as a banking guaranty, we submit that even then there is no reason why a national bank should receive a more favorable interpretation of applicable law and be excused from the consequence of withdrawing its guaranty and breaching its contract, in fact, if it had actually given one, particularly after the money had been sent and ordered to be paid by "Banque Francaise".

The Law Applicable

The Supreme Court of the United States has held that where one person receives funds for the benefit of another, the receiving party does not acquire title to the funds, but title belongs to the party for whose benefit the funds were received:

> "* * * where money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter." *McKee* v. *Lamon*, 159 U. S. 317, 322 (1895); *Brown* v. *J. P. Morgan & Co.*, 265 App. Div. 631, aff'd 295 N. Y. 867, 67 N. E. 2d 263; *Rogers Locomotive Works* v. *Kelley*, 88 N. Y. 234; *Sayer* v. *Winkoop*, 248 N. Y. 54, 161 N. E. 417.
>
> *Okeechobee County* v. *Florida National Bank of Jacksonville*, 145 Fla. 486, 1 So. 2d 263 (1941).

In that case, the funds had come to the bank from a third party for the benefit of the County of Okeechobee. This Court held that the bank having received the money, had no other option under the law than to deliver the funds to the beneficiary. The fact that the receiving bank had transferred the funds to another bank did not relieve the receiving bank of the obligation to pay the beneficiary even subsequent to the insolvency of the bank to which the funds had been transmitted.

Under the apparently well established and well settled law of Florida, title to the funds vested in the *cestui que trust*, Pierre Bourgeois, the instant the funds were sent by Banque Francaise du Commerce Exterieur.

In the third *Okeechobee* case, *supra*, this Court held that although the contracted guarantee was void, the bank would, nevertheless, be held for its assumption of obligations as constructive or resultant trustee. This Court held that the failure to deliver the fund to the beneficiary was not such an act as could abrogate the contract between the

bank as trustee, and the beneficiary for whom it had agreed to receive the funds. This Court said:

> "This duty could not be fulfilled by the Florida National Bank by merely paying the money to the other joint trustee * * * but the duty still existed to see that the money is returned to the *cestui que trust*, due consideration being given to the fact that the banks were held to be constructive or resulting trustees and not voluntary trustees of the funds." *Okeechobee County* v. *Florida National Bank*, 145 Fla. 496, 1 So. 2nd 263, 273.

The Mercantile National Bank having been guilty of bad faith, breach of contract, and tort in its conduct, fiduciary or otherwise, with its customer, the petitioner, it is liable in damages.

The text writers and the decisions fully sustain this contention of plaintiff.

90 Corpus Juris Secundum 834;
Lewine v. *National City Bank*, 248 N. Y. 365, 373, 162 N. E. 284;
Emmerich v. *City Farmers Bank & Trust Co.*, 300 N. Y. 417, 91 N. E. 2nd 868;
Madison Trust Co. v. *Carnegie Trust Co.*, 215 N. Y. 475, 109 N. E. 580;
Brill v. *Tuttle*, 81 N. Y. 455;
Grace v. *Corn Exchange Bank*, 287 N. Y. 94, 38 N. E. 449;
Munn v. *Boasberg*, 292 N. Y. 519, 54 N. E. 2nd 205;
Fidelity & Casualty Co. v. *Farmers National Bank*, 275 N. Y. 195, 205, 9 N. E. 2nd 833;
Bischoff v. *Yorkville Bank*, 218 N. Y. 106, 114, 112 N. E. 759;
Martin v. *First National Bank*, 51 F. 2nd 840 (D. Minn.);
Strauss v. *U. S. Fidelity Co.*, 63 F. 2nd 174 (4th Cir.);

Marcus v. *Otis*, 168 F. 2nd 649 (2nd Cir.);
In re The Van Sweringen Co., 119 F. 2nd 231, *Cert. denied*, 314 U. S. 671;
Gaines v. *Miller*, 111 U. S. 395;
Millett v. *Omaha National Bank*, 30 F. 2nd 665 (8th Cir.);
Colby v. *Riggs Bank*, 92 F. 2nd 183 (D. C. Cir.);
Lonsdale v. *Speyer*, 249 App. Div. 133;
Jacobellis v. *Prudential Ins. Co.*, 244 App. Div. 255, *aff'd* 269 N. Y. 632, 200 N. E. 32.

In Scott Trusts, Section 226:

"Where the trustee makes payment of trust funds or conveys trust property to a person other than the beneficiary entitled to the money or other property, he is liable to the beneficiary, unless the payment or conveyance was authorized by a proper court. This is true, of course, where he intentionally makes a payment or conveyance to the wrong person. It is also true where he reasonably believes that the person to whom he makes the payment or conveyance is entitled thereto."

In Restatement of the Law of Trusts, Section 326:

"A third person who, although not a transferee of trust property, has notice that the trustee is committing a breach of trust and participates therein is liable to the beneficiary for any loss caused by the breach of trust."

In 26 Ruling Case Law 1322:

"All persons knowingly participating in, or aiding in, committing a breach of trust, or in the misapplication of trust funds are equally liable with the trustee to make good the fund by returning it to the trust estate."

In *Raymond Concrete Pile Co.* v. *Federation Bank*:

> "Nor can a bank be a privy to a diversion of such a fund, though disinterested in it and be absolved from liability for the loss." 288 N. Y. 452, 458, 43 N. E. 2nd 486, 489.

In *Wechsler* v. *Bowman*:

> "Anyone who knowingly participates with a fiduciary in a breach of trust is liable for the full amount of the damage caused thereby to the cestuis que trust." 285 N. Y. 284, 291, 34 N. E. 2nd 322, 326.

In *Union Stock Yards Bank* v. *Gillespie*:

> "Here the beneficial owner was the Gillespies; the legal title was in the Rappels; but when they deposited with the bank, the latter received the moneys with notice that the beneficial interest was elsewhere than in the Rappels. It could not in equity take them and cancel their private debt to it." 137 U. S. 411, 423.

In *National Bank* v. *Insurance Co.*:

> "But it cannot be permitted to prevail against the equity of a beneficial owner, of which the bank had notice, either actual or constructive." 104 U. S. 54, 71.

CONCLUSION

For the reasons set forth above, we respectfully submit that this Court should issue its writ of certiorari to the Supreme Court of Florida.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner.

Appendix

Final Judgment of November 15, 1955

IN THE

CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT

IN AND FOR DADE COUNTY, FLORIDA

At Law—Case No. 33803

[SAME TITLE]

The above-styled cause coming on for trial before me, without a jury, trial by jury having been duly waived, and the court having heard the testimony and evidence offered by the respective parties, and Defendant having duly moved for a directed verdict or finding in favor of said defendant at the close of the Plaintiff's case, and the Court having heard argument of counsel, and being duly advised in the premises, finds as a matter of law, upon the undisputed testimony and evidence offered by said Plaintiff that said Plaintiff is not entitled to recover upon his Amended Complaint in the above-styled cause, nor upon either count thereof, and that defendant is entitled, as a matter of law, to final judgment, it is therefore:

CONSIDERED, ORDERED AND ADJUDGED that said Amended Complaint of Plaintiff, Pierre Bourgeois be and same is hereby dismissed, with prejudice, and at Plaintiff's costs, and that Plaintiff take and recover nothing of and from said defendant, Mercantile National Bank of Miami Beach, Florida, a United States Corporation, upon his said Complaint, and that said defendant recover its costs, to be taxed upon motion and notice.

DONE AND ORDERED in the City of Miami, Dade County, Florida, this 15th day of November, 1955.

VINCENT C. GIBLIN,
Circuit Judge.

Judgment

IN THE

CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT

IN AND FOR DADE COUNTY, FLORIDA

At Law, No. 33803-G

[SAME TITLE]

Miami, Florida,
Tuesday, November 15, 1955.

The above-entitled cause came on for further hearing before the Hon. Vincent C. Giblin, Judge of the above-styled Court, at his office in the Courthouse, Miami, Florida, on Tuesday, November 15, 1955, at 1:30 o'clock p. m. pursuant to adjournment on Saturday, November 12, 1955.

Appearances:

FRED KLEIN, Esq., and
GERARD EHRICH, Esq.,
Attorneys for plaintiff.

L. J. CUSHMAN, Esq., and
LEWIS HORWITZ, Esq.,
Attorneys for defendant.

The Court: I will hear argument of counsel now on the motion before the Court.

(Thereupon counsel argued to the Court.)

The Court: I will grant the pending motion. I think there is no cause of action or any claim for relief established by the evidence for the reason, if for no other reason, the bank could not, in my opinion, have safely surrendered the funds to the plaintiff without subjecting itself to liability as a guarantor.

I do not agree that the unconditional title and right to the possession of the funds rested in the plaintiff at any time until the bank assumed the obligation which was a condition precedent to its delivery of the funds to the plaintiff, that is, the guarantee of the payment of the note which was a part of the negotiations between the bank and the plaintiff and the other parties involved.

It is not necessary for me to rule on the many objections and motions made during the trial. If I should sustain all of the plaintiff's objections and grant all the plaintiff's motions and overrule all the defendant's objections and deny all of the defendant's motions, the result would be the same, in the light of the undisputed, uncontroverted evidence.

I do not think there is any case here at all. Nothing said changes my mind about it. I will enter judgment for the defendant.

(Thereupon the case was concluded.)

Opinion of Supreme Court of Florida

IN THE

SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1957

SPECIAL DIVISION B

Case No. 28,495

PIERRE BOURGEOIS,

Appellant,

vs.

MERCANTILE NATIONAL BANK OF MIAMI BEACH, FLORIDA, a United States corporation,

Appellee.

Opinion filed June 5, 1957.

An Appeal from the Circuit Court for Dade County, Vincent C. Giblin, Judge.

Rassner, Miller & Roth, for Appellant.

Broad & Cassel and L. J. Cushman, for Appellees.

PER CURIAM:

Affirmed.

TERRELL, *C.J.*, THORNAL & O'CONNELL, *JJ.*, & SANDLER, *Associate Justice*, Concur.